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IN THE

Supreme Court of the United States

October Term, 1997

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REVEREND RONNIE WALLACE, AND REVEREND JOHN BRADLEY,

Petitioners,

v.

JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA, STATE OF NORTH CAROLINA, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED BY REVERSING THE JUDGMENT OF THE DISTRICT COURT AND HOLDING IN FAVOR OF DEFENDANTS ON THE GROUNDS THAT ACTS COMPLAINED OF BY PLAINTIFFS AS UNCONSTITUTIONAL APPLICATIONS OF N.C. GEN. STAT. § 14-277.4 WERE ACTUALLY ACTS OUTSIDE THE AUTHORITY GRANTED TO POLICE OFFICERS BY THAT STATUTE.

II. WHETHER N.C. GEN. STAT. § 14-277 4 IS UNCONSTITUTIONAL AS APPLIED.

LIST OF PARTIES

The names of all parties to the proceedings below are set forth in the caption of this case. Neither James B. Hunt, Jr., Governor of North Carolina, nor the State of North Carolina itself is a corporation. *See* Rule 29.6.

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BRIEF OF JAMES B. HUNT, JR., and the STATE OF NORTH CAROLINA IN OPPOSITION

The Respondents, James B. Hunt, Jr., Governor of the State of North Carolina, and the State of North Carolina, respectfully request that this Court deny the petition for writ of

certiorari, seeking review of the United States Court of Appeals for the Fourth Circuit's opinion in this case. That opinion is reported at 126 F.3d 575 (4th Cir. 1997) (Petition A.1a - 27a).

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

In their original complaint, plaintiffs, who were at the time the complaint was filed private citizens of Mecklenburg County, North Carolina, challenged the constitutionality, both facial and as applied, of N.C. GEN. STAT. § 14.277.4, which prohibits obstruction of ingress to and egress from health care facilities. (App. pp. 22 *et seq.*) They sought declaratory relief holding the statute to be unconstitutional on its face and as applied; temporary, preliminary and permanent injunctive relief prohibiting enforcement of the statute; and attorneys' fees. (App. pp. 29-30) By their amended complaint, plaintiffs repeated their constitutional challenges to N.C. GEN. STAT. § 14-277.4 and made similar challenges to 18 U.S.C. § 248 -- the Federal Access to Clinic Entrances Act, or "FACE." (App. pp. 166 *et seq.*) They sought declaratory relief holding both statutes to be unconstitutional on their face and as applied; temporary, preliminary and permanent injunctive relief prohibiting enforcement of both statutes; and attorneys' fees. (App. pp. 173-74)

By his Judgment and Memorandum of Decision and Order entered April 1, 1996, and amended as to technical and typographical corrections on April 17, 1996, the Honorable Robert D. Potter held both N.C. GEN. STAT. § 14-277.4 and FACE to be "invalid and unconstitutional," and enjoined enforcement of both statutes. (App. pp. 471 *et seq*; Petition A.28a-94a) Judge Potter found, *inter alia*, that N.C. GEN. STAT. § 14-277.4 was vague and overbroad, and therefore violative of the First Amendment, and found the statute

unconstitutional as applied to plaintiffs. (Petition A.45a-52a, 93a) He further held that Congress lacked authority under the Commerce Clause and the Fourteenth Amendment to enact FACE, and found that FACE violates the First Amendment. (Petition A. 52a-90a, 94a)

All defendants appealed to the United States Court of Appeals for the Fourth Circuit. A unanimous panel of the Court of Appeals, by a decision reported at 126 F.3d 575 (4th Cir. 1997) (Petition A.1a - 27a), reversed the District Court. On November 14, 1997, the Court of Appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc*.

B. Factual Background.

N.C. GEN. STAT. § 14-277.4, which became effective October 1, 1993, prohibits obstruction of ingress to and egress from health care facilities. (Petition A. 155a-156a) Plaintiffs are persons who are opposed to abortion on moral, ethical, scientific and religious grounds and who have engaged and wish to continue engaging in protest activity -- including marches, leafleting, display of signs and placards, and conversing with individuals -- at abortion clinics. (Complaint ¶¶ 10-11, App. p. 25; Amended Complaint ¶¶ 10-11, App. pp. 168-69; Transcript of February 2, 1992, hearing, pp. 42-44, 57-58, 60, 69-70, 88-89, App. pp. 347-349, 362-63, 365, 374-75, 393-94.) At the hearing on February 2, 1996, plaintiffs offered evidence that could tend to show that police officers of the City of Charlotte have threatened them with arrest when they have engaged in protest activities at abortion clinics and have, at one time or another, given them differing and conflicting interpretations of N.C. GEN. STAT. § 14-277.4. (Transcript of February 2, 1996, hearing, pp. 9-30, 35-36, 45-53, 58-65, 71-

78; App. pp. 314-335, 340-341, 350-358, 363-370, 376-383). Plaintiffs' evidence also showed, however, that police officers were also attempting to enforce other statutes and ordinances at demonstrations at abortion clinics, and that plaintiffs were frequently confused as to which statute or ordinance the police were attempting to enforce in specific situations. (Transcript of the February 2, 1996, hearing, pp. 66-68, 74-75; App. pp. 371-73, 379-80.) The evidence was unequivocal, however, that none of the plaintiffs has ever been arrested for, charged with, or convicted of violation of N.C. GEN. STAT. § 14-277.4. (Transcript of the February 2, 1996, hearing, pp. 40, 55, 68, 81, 89; App. pp. 345, 360, 373, 386, 394.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS HAVE FAILED TO ESTABLISH THAT APPROPRIATE GROUNDS FOR GRANTING A WRIT OF CERTIORARI EXIST IN THIS CASE.

In their petition, petitioners urge that a writ of certiorari should be granted because the "ruling of the Fourth Circuit is so extreme, perverse, and contrary to this Court's settled precedent that it warrants summary reversal." (Petition, p. 14) Petitioners continue by arguing that, "[i]n the alternative, this Court should grant plenary review to redress the serious doctrinal confusion the decision below will spawn." (*Id.*) Petitioners, however, have failed to demonstrate that appropriate grounds for granting a writ of certiorari exist in this case.

Pursuant to Rule 10.1(a) of the Rules of the Supreme Court:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers;
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

None of these criteria apply to this petition. Of these criteria, only the last one can even reasonably be considered to have been raised by petitioners. Petitioners are wrong, however, in asserting that the decision of the Court of Appeals "is so extreme, perverse, and contrary to this Court's settled precedent that it warrants summary reversal" or that "serious doctrinal confusion" will result from the decision below.

Indeed, the decision below is in complete accord with the established precedent of this Court. The Court of Appeals, in addressing petitioners' contention that N.C. GEN. STAT. § 14-

277.4 had been unconstitutionally applied to them, noted that "we need not reach the constitutional question if there exists an alternative, nonconstitutional basis for our decision." *Hoffman v. Hunt,* 126 F.3d 575, 582 (4th Cir. 1997) (Petition A.13a). Citing *Peters v. Hobby,* 349 U.S. 331 (1955) (where this Court examined whether action taken by a loyalty review board was consistent with the power granted that board before considering whether the board's action was constitutional), the court stated that, "before deciding whether application of [N.C. GEN. STAT.] § 14-277.4 to protected free speech would violate the First Amendment, we first determine whether the statute permits such application." (*Id.*) The court then determined that the actions in which petitioners had engaged, and which they argued had led to threats of arrest, were not prohibited by N.C. GEN. STAT. § 14-277.4, and that

> [b]ecause law enforcement officers exceeded their authority in threatening Plaintiffs with arrest for activities that did not violate [N.C. GEN. STAT.] § 14-277.4, we need not determine whether these threats also contravened the First Amendment.

Hoffman, 126 F.3d at 582 (Petition A.13a-14a).

The approach of determining issues on nonconstitutional grounds before considering constitutional questions is well established in the precedence of this Court. *See Peters,* 349 U.S. at 338. *See also Clinton v. Jones,* ___ U.S. ___, ___, 117 S.Ct. 1636, 1642 (1997) (Court has often stressed the importance of avoiding the premature adjudication of constitutional questions, and this doctrine of avoidance is

applicable to the entire federal judiciary); *Lambrix v. Singletary*, ___ U.S. ___, ___, 117 S.Ct. 1517, 1523 (1997) (issues of procedural bar should be considered prior to consideration of constitutional issues because "[c]onstitutional issues are generally to be avoided"); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"). Petitioners' contentions that the decision below, then, is "pernicious" or "perverse," or that it will "spawn" "serious doctrinal confusion," are specious at best. Petitioners have utterly failed to demonstrate "compelling reasons" for review of the decision below, just as they have failed to demonstrate that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10.1(a) of the Rules of the Supreme Court. The petition for a writ of certiorari should accordingly be denied.

II. THE COURT OF APPEALS DID NOT ERR IN REVERSING THE DISTRICT COURT'S DECISION THAT N.C. GEN. STAT. § 14-277.4 HAS BEEN UNCONSTITUTIONALLY APPLIED TO PETITIONERS.

Petitioners argue that the Court of Appeals erred by reversing the District Court's decision that the provisions of N.C. GEN. STAT. § 14-277.4 have been unconstitutionally applied to them. Petitioners contend that the court misconstrued the distinction between facial constitutional challenges and "as applied" challenges, and that in so doing, the

court engaged in "Alice in Wonderland jurisprudence." (Petition, p. 14) It is petitioners, however, who have misapprehended both the law and the decision of the Court of Appeals.

Initially, it should be noted that petitioners have not sought review of the Court of Appeals' decision that N.C. GEN. STAT. § 14-277.4 is constitutional on its face and is neither vague nor overbroad. *Hoffman v. Hunt,* 126 F.3d 575, 581-82 (4th Cir. 1997) (Petition A.9a-12a). That issue, therefore, is not before this Court.

Also, it should be noted that petitioners are incorrect when they state that "there is simply no dispute that the challenged statute, N.C.G.S. § 14-277.4, has been applied in a flagrantly unconstitutional manner." Respondents have disputed this throughout the proceedings of this case, and indeed specifically so argued before the Court of Appeals, the court's statement to the contrary notwithstanding. *Hoffman,* 126 F.3d at 582 (Petition, p. 13, A.12a) While it is undisputed that law enforcement officers threatened petitioners with arrest as they have described, there is a dispute as to whether the officers did so to enforce the provisions of N.C. GEN. STAT. § 14-277.4. The record in this case shows confusion as to exactly which law the police officers were attempting to enforce when they told the plaintiffs that certain actions could lead to arrest. While the district court assumed that all communications coming from police officers were attempts to enforce N.C. GEN. STAT. § 14-277.4, petitioners' own evidence showed that police officers were attempting to enforce both N.C. GEN. STAT. § 14-277.4 and the Charlotte parade and picketing ordinance at demonstrations at abortion clinics. (Transcript of

the February 2, 1996, hearing, pp. 66-68, 74-75; App. pp. 371-73, 379-80.) Accordingly, the State did and does disagree with petitioners' assertion that the record clearly establishes that threats of arrest against them were made solely to enforce the provisions of N.C. GEN. STAT. § 14-277.4.

Similarly, petitioners mischaracterize the decision of the Court of Appeals for the Fourth Circuit. Petitioners argue that

> [b]y holding the threats of arrest to be *illegal* as well as unconstitutional, the court simply found an additional reason to grant petitioners relief on their "as applied" challenge. To *deny* relief against the threatened arrests because those arrests were *illegal* is Alice in Wonderland jurisprudence.

(Petition, pp. 13-14, emphasis original.) The court below, however, did not find "the threats of arrest to be illegal as well as unconstitutional." Indeed, the Court of Appeals, properly applying the well established principal that questions should, if possible, be decided on nonconstitutional grounds, specifically declined to consider whether the threats of arrest amount to unconstitutional applications of N.C. GEN. STAT. § 14-277.4. *Hoffman*, 126 F.3d at 582 (Petition A. 13a-14a). *See also Clinton v. Jones*, ___ U.S. ___, ___, 117 S.Ct. 1636, 1642 (1997); *Lambrix v. Singletary*, ___ U.S. ___, ___, 117 S.Ct. 1517, 1523 (1997); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). The court did this because it had determined that law enforcement officers exceeded their authority by threatening arrest under N.C. GEN. STAT. § 14-277.4 for acts not prohibited by that statute. *Hoffman*, 126 F.3d

at 582 (Petition A. 13a-14a). Because, then, the threats of arrest could be invalidated as *ultra vires*, there was no need to determine whether they were also unconstitutional. *Id.*

For this same reason, petitioners misunderstand the opinion of the Court of Appeals when they argue that the court "collapsed the 'facial' and 'as applied' challenges into one." (Petition. p. 14) The Court of Appeals did not fail to recognize the difference between a facial challenge and an "as applied" one, nor does the court's opinion lead to the conclusion that any statute that is found to be facially valid will also survive an "as applied" challenge, because "any unconstitutional application automatically is a misapplication of the statute." (*Id.*) Rather, the Court of Appeals recognized that, in this particular case, the specific threats of arrest put forth by petitioners did not constitute violations of N.C. GEN. STAT. § 14-277.4, and that such threats therefore exceeded the authority conferred by that statute. Accordingly, the court in this instance could properly avoid determining a constitutional question because a nonconstitutional basis existed by which the court could resolve the issues before it.

The court below held that N.C. GEN. STAT. § 14-277.4 "is not violated by peaceful protest activity that does not physically obstruct or block access to or egress from a health care facility." *Hoffman*, 126 F.3d at 582 (Petition A. 13a). This holding establishes that law enforcement officers may not threaten petitioners or any other persons with arrest pursuant to N.C. GEN. STAT. § 14-277.4 for any conduct that does not physically prevent another from entering or leaving a health care facility. This holding further establishes that the specific threats complained of by petitioners, assuming they were

indeed made pursuant to N.C. GEN. STAT. § 14-277.4, which respondents do not concede, were improper and unsustainable. Petitioners, then, have hardly been denied relief as to these threats of arrest. Rather, they simply have been accorded relief on nonconstitutional grounds. Issuance of the Court's writ of certiorari to review this issue is, therefore, inappropriate and unnecessary.

CONCLUSION

For these reasons, the petition for writ of certiorari as to petitioners' challenges to N.C. GEN. STAT. § 14-277.4 should be denied.

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